SUPREME COURT, U.S. DEC 17 19
MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

No. 73-836

STATE OF LOUISIANA, ex rel.
EDGAR L. BARRABINO,
Respondent,

versus

C. MURRAY HENDERSON, Warden,
Louisiana State Penitentiary,
Petitioner.

SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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MAY IT PLEASE THE COURT:

The State of Louisiana is of the respectful belief that this Honorable Court's decision in *Davis v. United States*, 411 U.S. 233 (1973), is highly relevant herein, although through oversight this case is not discussed or cited in Louisiana's original Petition For Certiorari in the instant proceeding.

In *Davis*, three years after his trial the accused brought a collateral attack on his conviction, alleging that there had been unconstitutional discrimination

in the composition of the grand jury that indicted him. The district court found that although Davis could have done so, he at no stage of the proceedings attacked the grand jury's composition, and it concluded that under Federal Rule of Criminal Procedure 12(b)(2) he had waived his right to do so. The Court of Appeals affirmed on the basis of *Shotwell Mfg. Co. v. United States,* 371 U.S. 341 (1963), and Rule 12(b)(2).

This Court granted certiorari and affirmed, holding that the waiver standard set forth in Rule 12(b)(2) governs an untimely claim of grand jury discrimination not only during the criminal proceeding but also later on collateral review.

> "We think it inconceivable," said this Court, "that Congress, having in the criminal proceeding foreclosed the raising of a claim such as this after the commencement of trial in the absence of a showing of 'cause' for relief from waiver, nonetheless intended to perversely negate the Rule's purpose by permitting an entirely different but much more liberal requirement of waiver in federal habeas proceedings." 411 U.S. at 242.

Similarly, the State of Louisiana is of the respectful view that Article 703 of the Louisiana Code of Criminal Procedure, which provides that a person aggrieved by an unconstitutional search and seizure may move to suppress the unconstitutionally seized evidence "no later than three judicial days before the trial on the merits begins" unless some exceptional circumstances

are shown, may not be circumvented years after the trial in a habeas corpus proceeding.

Respectfully submitted,

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CERTIFICATE

I certify that a copy of this Supplemental Petition For Certiorari has been mailed to:

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